IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE: ETHICON, INC.,

PELVIC REPAIR SYSTEM

PRODUCTS LIABILITY LITIGATION

MDL No. 2327

THIS DOCUMENT RELATES TO:

Wemmelmann v. Ethicon, Inc., et al.

Civil Action No. 2:14-cv-20539

MEMORANDUM OPINION AND ORDER

Pending before the court is a Motion to Dismiss with Prejudice filed by Ethicon, Inc. and

Johnson & Johnson (collectively "Ethicon"). [Docket 10]. Plaintiff has not responded, and the

deadline for responding has expired. Thus, this matter is ripe for my review.

Ethicon's Motion arises from this court's Order [Docket 8], entered on August 18, 2015,

denying Ethicon's Motion for Sanctions, including monetary penalties, dismissal and any other

sanction deemed appropriate by the court, for failure to file a Plaintiff Profile Form ("PPF") in

compliance with Pretrial Order # 17. In reaching this decision, I relied on Wilson v. Volkswagen

of America, Inc., 561 F.2d 494 (4th Cir. 1977), in which the Fourth Circuit identified four factors

that a court must consider when reviewing a motion to dismiss on the basis of noncompliance with

discovery. (See Order [Docket 8], at 4–7 (applying the Wilson factors to Ms. Wemmelmann's

case)). Concluding that the first three factors weighed in favor of sanctions as requested by

¹ The *Wilson* factors are as follows:

(1) Whether the noncomplying party acted in bad faith; (2) the amount of prejudice his noncompliance caused his adversary, which necessarily includes an inquiry into the materiality of the evidence he failed to produce; (3) the need for deterrence of the particular sort of

noncompliance; and (4) the effectiveness of less drastic sanctions.

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Ethicon, I nevertheless declined to award the requested sanction of \$100 for each day the plaintiff's

PPF was late because it would offend the court's duty under Wilson's fourth factor, which is to

consider the effectiveness of lesser sanctions. In recognition of this duty, I gave the plaintiff "a

final chance to comply with discovery." (Id. at 7). I afforded her 30 business days from the entry

of the Order to submit to Ethicon a completed PPF, with the caveat that a failure to do so "will

result in dismissal with prejudice upon motion by the defendant." (Id.). Despite this warning, Ms.

Wemmelmann has again refused to comply with this court's orders and did not provide Ethicon

with her PPF within the 30-day period. Consequently, Ethicon moved to dismiss the case with

prejudice.

Because the less drastic sanction instituted against Ms. Wemmelmann has had no effect on

her compliance with and response to this court's discovery orders, which she has continued to

blatantly disregard, I find that dismissal with prejudice is now appropriate. For the reasons

explained in my August 18, 2015 Order [Docket 8], it is **ORDERED** that Ethicon's Motion to

Dismiss with Prejudice [Docket 10] is **GRANTED**, and this case is **DISMISSED** with prejudice.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any

unrepresented party.

ENTER: November 10, 2015

UNITED STATES DISTRICT JUDGE

Mut. Fed. Sav. & Loan Ass'n v. Richards & Assocs., Inc., 872 F.2d 88, 92 (4th Cir. 1989) (citing Wilson, 561 F.2d at 503-06).

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